No. 75-1805

In the Supreme Court of the United States

OCTOBER TERM, 1976

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General,
ROBERT J. ERICKSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 1101.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1976. A petition for rehearing was denied on May 18, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 12, 1976, and was granted on October 4, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause barred petitioner's prosecution and punishment for engaging in a continuing criminal enterprise following his conviction of conspiracy to distribute narcotics.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

21 U.S.C. 841 provides in pertinent part:

> (a) * * * it shall be unlawful for any person knowingly or intentionally—
>
> (1) to * * * distribute * * * a controlled substance * * *.
>
> (b) * * * any person who violates subsection (a) * * * shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. 848 provides in pertinent part:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

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(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 * * * shall not apply.

STATEMENT

1. On March 18, 1974, petitioner and twelve other individuals were charged in a one-count indictment (A. 5–11) in the United States District Court for the Northern District of Indiana with conspiring over a two and a half year period to distribute heroin and cocaine, in violation of 21 U.S.C. 846. On that date petitioner was also separately indicted (A. 3–4) for having engaged during the same period in a continuing criminal narcotics enterprise, in violation of 21 U.S.C. 848. The government sought to consolidate the indictments for trial (A. 12–14). Petitioner objected to consolidation on the grounds, among others, that the two offenses were not the same and that consolidation would be prejudicial (A. 15–24). The district court denied the government's motion and ordered that the charges be tried separately (Pet. App. 5–6).

In June 1974, after a jury trial, petitioner and six co-defendants were convicted as charged under the

a massive scale (Tr. 229–232, 234–235, 348, 358, 397, 402).

conspiracy indictment. Petitioner was sentenced to 15 years' imprisonment, three years' special parole, and a fine of $25,000. The court of appeals affirmed, 520 F. 2d 1256, and this Court denied a petition for a writ of certiorari, 423 U.S. 1066.[1]

In March 1975, after another jury trial, petitioner was convicted as charged under the continuing criminal enterprise indictment. He was sentenced to life imprisonment, to be served consecutively to his sentence on the conspiracy conviction, and to a fine of $100,000.

2. The evidence at the second trial (summarized by the court of appeals at Pet. App. 2–4) showed that petitioner was the head of a sophisticated narcotics distribution network operating in Gary, Indiana, from January 1972 to March 1974 (Tr. 226–228, 345–346, 397–398). The organization, known as "the Family," was originally formed by petitioner and five others to steal or extort money and drugs from other narcotics dealers (Tr. 226–230, 345–346, 397–398). Under petitioner's direct supervision, however, the Family quickly expanded in membership and soon undertook to procure and distribute heroin on

[1] Petitioner and his co-defendants subsequently filed a motion pursuant to 28 U.S.C. 2255 to set aside their convictions in that case on the principal ground of ineffective assistance of counsel. The district court denied the motion and the court of appeals affirmed (C.A. 7, No. 76–1532, unpublished opinion dated November 24, 1976). A petition for review of that decision is now pending before the Court in No. 76–5974.

The Family distributed 1,000 to 2,000 capsules of heroin a day and had net receipts (after commissions to street distributors) of about $5,000 a day (Tr. 490–491, 535). The receipts were turned over to petitioner (Tr. 229–230, 248–249, 353–355, 403–404, 459–464). Although he initially served only as treasurer of the Family, petitioner in a short time assumed control and transformed the cooperative venture into his personal enterprise. The court of appeals estimated that his personal income from the narcotics distributions during the two-year period exceeded one million dollars (Pet. App. 4; see Tr. 311–313, 536). Beyond the amounts treated by petitioner as personal income, sufficient profits remained to enable him to pay Family members' salaries, apartment rental fees, and bail bond fees, and to purchase automobiles for some of them (Tr. 249–258, 315–318, 359, 363–365, 501–502, 796–799). Petitioner maintained control over the Family by beating and shooting members who he determined should be disciplined (Pet. App. 3–4; Tr. 272–275, 407–412, 440, 634–635).

The evidence regarding the criminal activities of the Family was substantially similar to the evidence adduced at the previous trial of petitioner and other Family members for conspiracy. By contrast, much of the evidence regarding petitioner's personal authority over the Family and the substantial income he derived from the narcotics trafficking—necessary elements of the continuing criminal enterprise of-

fense but not of the conspiracy—was brought out for the first time at the second trial.

3. The court of appeals affirmed petitioner's conviction, rejecting his argument that the prosecution and punishment for engaging in a continuing criminal enterprise was barred, under the Double Jeopardy Clause, by his previous conviction and sentence for conspiracy. The court believed that conspiracy is a lesser included offense of a continuing criminal enterprise (Pet. App. 7–8) and expressed the view that petitioner's conviction would have been reversed under what it considered to be traditionally established double jeopardy principles (*ibid.*).

But the court then held (Pet. App. 11) that *Iannelli* v. *United States,* 420 U.S. 770, had established "a new double jeopardy approach towards complex statutory crimes"—an approach that, in the court's view (Pet. App. 14–15), disregards earlier tests for identity of offenses and focuses instead on whether Congress intended the statutes in question to prohibit and punish different types of conduct. It concluded that under this new approach the second prosecution here was permitted. The court reviewed the legislative history of Sections 846 and 848 and determined (Pet. App. 15) that "[t]he crime of engaging in a continuing criminal enterprise is aimed at something much different than just punishing concerted drug violations [*i.e.,* conspiracies]." Conspiracy, said the court (*ibid.*), "is aimed at the evil of collective criminal agreement, and seeks to attack problems quite apart

from the evil of the underlying offense," whereas Congress' purpose in prohibiting a continuing criminal enterprise was "to severely punish those criminals who made a substantial living by violating the drug laws" (Pet. App. 16). The court concluded (Pet. App. 18; footnote omitted): "Congress did not intend that continuing criminal enterprise be just another degree of conspiracy, but intended that it be a substantially separate crime, an independent weapon in the government's arsenal in the war on illicit drugs."

The court accordingly held (Pet. App. 18–19) that conspiracy and engaging in a continuing criminal enterprise are not the same offense and that petitioner's conviction and punishment for both did not violate the Double Jeopardy Clause.

SUMMARY OF ARGUMENT

In Part I of our brief we show that this case involves multiple prosecutions only, raising no meaningful issue of double punishment. Thereafter we make alternative arguments, either of which, if accepted, is sufficient to support affirmance of the judgment below. In Part II we contend that conspiracy is not a lesser included offense of a continuing criminal enterprise. In Part III we argue that, even if it is, the prosecution for the continuing criminal enterprise was permitted because the Double Jeopardy Clause does not generally bar prosecution for a greater offense following conviction of a lesser included offense. At the very least, prosecution for the greater offense following conviction of the lesser is permitted whenever the separate trials result from the defendant's

insistence (as here) or from the government's inability for any legitimate reason to try both offenses simultaneously in one trial.

I

Petitioner's sentence to life imprisonment for the continuing criminal enterprise offense removes from this case any question whether that sentence and petitioner's 15-year sentence for conspiracy amount to double punishment. Petitioner is not eligible for parole at any time under the continuing criminal enterprise sentence (21 U.S.C. 848(c)), and therefore even if he has been sentenced twice for the same offense and would in theory be entitled to vacation of the sentence for conspiracy, the multiple punishment has no practical significance. We accordingly agree with petitioner (Br. 7, 21) that the issue of multiple punishment is not presented in this case, and that the question for decision is whether the prosecution and *any* punishment for the continuing criminal enterprise violated petitioner's rights under the Double Jeopardy Clause.

II

A. We submit that *Iannelli* v. *United States,* 420 U.S. 770, controls this case. There the defendants were convicted of and sentenced cumulatively for engaging in an illegal gambling business, in violation of 18 U.S.C. 1955, and for conspiring to commit that offense, in violation of 18 U.S.C. 371. This Court ruled that the consecutive sentences were proper for the reason, *inter alia*, that the conspiracy was not a

lesser included offense of the substantive violation under the *Blockburger* test of "whether each provision requires proof of a fact which the other does not" (*Blockburger* v. *United States*, 284 U.S. 299, 304). The Court noted (420 U.S. at 785 n. 17) that "[t]he essence of the crime of conspiracy is agreement, * * * an element not contained in the statutory definition of the § 1955 offense. In a similar fashion, proof of violation of § 1955 requires establishment of a fact [*i.e.*, that the defendants actually conducted an illegal gambling business] not required for conviction for conspiracy to violate that statute."

The offenses here, like the offenses in *Iannelli*, are not necessarily the same. A criminal agreement—"[t]he essence of the crime of conspiracy"—will not always be an essential element of a continuing criminal enterprise violation, any more than it is an essential element of the Section 1955 offense charged in *Iannelli*. That Section makes it a crime to operate an illegal gambling business that "involves five or more persons," while Section 848 prohibits continuing narcotics violations undertaken "in concert with five or more other persons." The minor difference in phraseology does not mean that Congress intended the latter provision to require proof of a meeting of guilty minds but not the former, and accordingly under the *Blockburger* test conspiracy is not necessarily a lesser included offense of a continuing criminal enterprise. The legislative history of the Act and the decisions of the courts of appeals support this conclusion.

B. Although it is therefore possible to engage in a continuing criminal enterprise without also participating in a conspiracy, we note that in any particular case a conspiracy may in fact be necessarily included in the continuing enterprise charged. This seeming paradox comes about by virtue of the distinctive nature of the offense proscribed by Section 848, an offense in some respects quite unlike the single-transaction crimes in connection with which much of the jurisprudence of the Double Jeopardy Clause has evolved.

To convict of the crime of engaging in a continuing criminal enterprise, the government must prove (Section 848(b)) that the defendant has violated a felony provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and that the violation

> * * * is a part of a continuing series of violations of [the Act]—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom [the defendant] occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which [the defendant] obtains substantial income or resources.

Thus, proof of a continuing criminal enterprise requires proof of some number of independent violations of the Act, and the continuing enterprise may therefore be said to have lesser offenses necessarily included within it. No particular underlying violation

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fits the traditional definition of a necessarily included offense, however, since the continuing enterprise may have been committed (and be proved) by means of any number of other independent violations. But since some underlying violations must be proved, those that the government charges are, at least in one sense, "lesser included" offenses.

It follows that, if a conspiracy is one of the underlying violations charged, it may constitute a lesser included offense of the continuing criminal enterprise. In this case, however, since the underlying violations charged to prove petitioner's continuing criminal enterprise violation were substantive offenses (see A. 3), the conspiracy for which petitioner was first convicted was not a lesser included offense of the continuing criminal enterprise of which he was subsequently convicted.

III

A. Should the Court disagree with us and rule that the conspiracy was necessarily included in the continuing criminal enterprise, we submit that the successive prosecutions were nevertheless permissible under the Double Jeopardy Clause. In the first place, they came about only because of petitioner's insistence—contrary to the position he now asserts—that the offenses charged were different and could not be tried together. But if the conspiracy charged was a lesser included offense of the continuing enterprise, then the government was right in seeking to try the indictments together, and petitioner's success in urging

their severance should not now immunize him from prosecution on the greater offense any more than a mistrial granted at the defendant's request or a successful appeal by the defendant of his conviction confers immunity from reprosecution.

B. In any event, it does not violate the Double Jeopardy Clause for the government to prosecute a defendant for a greater offense after having successfully prosecuted him on a lesser included offense, so long as he was not in jeopardy on the greater offense at the first trial and is not placed in jeopardy again on the lesser included offense at the second trial. Thus, in *Diaz* v. *United States,* 223 U.S. 442, this Court held that a prosecution for murder was not barred by the defendant's prior conviction for assault where the victim had died following the first conviction and the defendant had not previously been in jeopardy for the murder. "[A]ll that could be claimed for [the jeopardy at the first trial]," said the Court (*id.* at 449), "was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done * * *."

In the present case, petitioner was not in jeopardy on the continuing criminal enterprise charge during his conspiracy trial, nor was he in jeopardy on the conspiracy charge (which was not treated as a lesser included offense) during the continuing enterprise trial. Since he was never placed twice in jeopardy for

the same offense, it follows that the successive trials were not barred by the Double Jeopardy Clause. And although successive prosecutions that pass muster under the Double Jeopardy Clause might in some circumstances be so unfair as to violate due process, in this case, where save for petitioner's insistence there would have been one trial rather than two, the government's conduct was not unfair at all.

Even if the Court should not agree that the Double Jeopardy Clause always permits prosecution of the greater offense following conviction on the lesser (provided that the defendant is not in jeopardy for both offenses at either trial), we submit that, at the very least, it allows subsequent prosecution on the greater offense whenever for legitimate reasons the government could not have charged that offense at the time of the trial of the lesser. See Friedland, *Double Jeopardy* 192 (1969); Note, *Twice in Jeopardy,* 75 Yale L.J. 262, 295 (1965); cf. *Blackledge* v. *Perry,* 417 U.S. 21, 29 n. 7; *Ashe* v. *Swenson,* 397 U.S. 436, 453 n. 7 (Brennan, J., concurring); *United States* v. *Jamison,* 505 F. 2d 407, 416–417 (C.A.D.C.).

In this case the government was prevented from trying the two indictments together by order of the district court, and in these circumstances the subsequent prosecution for the continuing criminal enterprise violated none of the policies protected by the Double Jeopardy Clause. It was not brought to harass petitioner or—petitioner never having been in jeopardy for the continuing criminal enterprise violation—to seek a conviction for a crime of which petitioner had earlier been acquitted or convicted. Petitioner was not placed twice in jeopardy of conviction for the conspiracy, since it was properly not considered a lesser included offense at the trial for the continuing criminal enterprise violation. *Diaz* v. *United States, supra,* 223 U.S. at 449. And finally, for the reasons earlier stated, petitioner has not been punished separately—in any meaningful way—for both the lesser and the greater offenses, since the maximum sentence he received for the greater offense leaves the sentence he received for the lesser offense with no practical effect.

c. *Waller* v. *Florida,* 397 U.S. 387, does not forbid the result we seek. In that case the issue was whether the petitioner could be prosecuted in state court for the same offense for which he had previously been convicted in municipal court. In holding that the municipality and the State were not different sovereigns for purposes of the Double Jeopardy Clause, the Court did not focus on the relationship between the lesser and greater offenses that were there assumed to have been the same offense and did not decide whether prosecution on a greater offense is permissible when for legitimate reasons it could not have been charged at the time of trial of the lesser included offense. See *Culberson* v. *Wainwright,* 453 F. 2d 1219, 1220 (C.A. 5).

ARGUMENT

I. THE SENTENCES IMPOSED ON PETITIONER FOR BOTH THE CONSPIRACY AND THE CONTINUING CRIMINAL ENTERPRISE DO NOT SUBJECT HIM TO IMPERMISSIBLE DOUBLE PUNISHMENT

At his first trial petitioner was convicted of a violation of 21 U.S.C. 846, which provides that "[a]ny person who * * * conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy." The crime charged and proved was conspiracy to distribute narcotics (Pet. Br. 4). Distribution of narcotics is an offense under Section 841(a), the punishment for which is imprisonment not to exceed 15 years, a fine of not more than $25,000, or both. 21 U.S.C. 841(b). For the conspiracy conviction petitioner was sentenced to 15 years' imprisonment and a fine of $25,000.

A continuing criminal enterprise violation carries with it (for a first offender) a minimum penalty of ten years' imprisonment and a maximum penalty of life imprisonment and a fine up to $100,000. 21 U.S.C. 848(a).[2] For his conviction of that offense, at the conclusion of his second trial, petitioner was sentenced to a fine of $100,000 and to life imprisonment, to be

[2] That Section also provides for forfeiture of the defendant's profits derived from the criminal enterprise as well as any interest in, claim to, or contractual or property rights affording a source of influence over the enterprise. 21 U.S.C. 848(a)(2).

served consecutively to the 15-year sentence for the conspiracy.

If, as we contend below, in certain circumstances the Double Jeopardy Clause allows prosecution and punishment for a greater offense after conviction and sentence on a lesser included offense, then cases may arise in which, in order to avoid multiple punishments for the same offense, it will be necessary in fixing the sentence on the greater offense to take into account any sentence already imposed on the lesser (as, for example, by crediting any time already served for the lesser offense against the time to be served for the greater). See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 289 n. 128 (1965).

But that issue does not arise in this case, even assuming that conspiracy is a lesser included offense of engaging in a continuing criminal enterprise, for petitioner is not eligible for parole under the continuing criminal enterprise sentence. 21 U.S.C. 848(c).[3] If that sentence is valid, he will spend the remainder of his life in prison, and whether the 15-year sentence

[3] That Section provides that "[i]n the case of any sentence imposed under this section, * * * section 4202 of Title 18 * * * shall not apply." Before its repeal by the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 (to be codified at 18 U.S.C. (1976 ed.) 4201-4218), Section 4202 was the principal parole eligibility provision for federal prisoners. Section 4205 is the relevant provision of the new Act, which preserves the no-parole stricture of Section 848(c). See 18 U.S.C. (1976 ed.) 4205(h) ("Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law") and 4205(a) (providing for parole eligibility "except to the extent otherwise provided by law").

on the conspiracy conviction amounts to impermissible cumulative punishment is of only abstract interest. There is no way to "credit" petitioner's 15-year sentence against his no-parole life sentence. Nor would the effect on petitioner have been any different had the two sentences been made to run concurrently rather than consecutively—or, indeed, had no sentence at all been imposed for the conspiracy. And even if the conspiracy for which petitioner was convicted was a necessarily included offense of the continuing criminal enterprise, with the result that the first conviction itself should, in the abstract, be vacated (see *Fuller* v. *United States,* 407 F. 2d 1199, 1233 n. 52 (C.A.D.C.) (*en banc*), certiorari denied, 393 U.S. 1120), that conviction can have no practical adverse impact on petitioner, since it will never be taken into account in determining his parole eligibility and since, even if it caused him to be sentenced for some other offense as a multiple offender, no meaningful additional sentence can ever be imposed on petitioner. Cf. *Benton* v. *Maryland,* 395 U.S. 784, 790–791.

We therefore agree with petitioner (Br. 21) that "this is not a case of multiple punishments." The critical issue, rather, is whether the Double Jeopardy Clause was offended by petitioner's prosecution and receipt of any punishment for the continuing criminal enterprise violation.

II. *IANNELLI* V. *UNITED STATES* CONTROLS THIS CASE

A. The defendants in *Iannelli* v. *United States,* 420 U.S. 770, were convicted and some of them were cumulatively sentenced [4] for conspiring, in violation of 18 U.S.C. 371,[5] to violate 18 U.S.C. 1955, and for violating Section 1955 itself.[6] They argued unsuccessfully that, since Section 1955 defines an "illegal gambling business" to mean one that *inter alia* "involves five or more persons," prosecution and punishment for conspiracy to commit that crime were forbidden by Wharton's Rule, "an exception to the general principle that a conspiracy and the substantive offense that is its immediate end do not merge upon proof of the latter" (420 U.S. at 781–782).

Although he invokes *Blockburger* v. *United States,* 284 U.S. 299, rather than Wharton's Rule, petitioner

[4] See 420 U.S. at 772 n. 4.

[5] Section 371, the general conspiracy statute, provides in pertinent part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[6] Section 1955 provides in pertinent part:

"(a) Whoever conducts * * * an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct * * * such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

makes essentially the same argument.[7] A continuing criminal enterprise is defined (21 U.S.C. 848(b)) as a series of felony violations by the defendant of the Comprehensive Drug Abuse Prevention and Control Act of 1970 that are *inter alia* "undertaken * * * in concert with five or more other persons."[8] Petitioner contends (Br. 7–9), as did the defendants in *Iannelli* with regard to the "involv[ing] five or more persons" language of Section 1955, that this statutory definition of a continuing criminal enterprise necessarily involves proof of a conspiracy—*i.e.*, that the continuing crime is impossible to commit without commission of conspiracy as well. He concludes that conspiracy is a lesser included offense of a continuing criminal enterprise and that therefore his prosecution for the latter after his conviction on the former violated the Double Jeopardy Clause.

Although the court of appeals accepted (Pet. App. 7–10) petitioner's first premise—that conspiracy is a lesser included offense of a continuing criminal enterprise—we believe that this Court should reject it upon the authority of *Iannelli*.[9] In that case the Court noted (420 U.S. at 785 n. 17) that, as a test for determining whether two statutes proscribe the same or different offenses, "*Blockburger* requires that courts examine the [statutes] to ascertain 'whether each provision requires proof of a fact which the other does not.' [284 U.S.] at 304." The Court then applied that test to the offenses proscribed by 18 U.S.C. 371 and 1955. In language particularly relevant here (420

[7] Wharton's Rule "is essentially an aid to the determination of legislative intent" (*Iannelli* v. *United States*, *supra*, 420 U.S. at 786), and "[t]he test articulated in *Blockburger* * * * serves a generally similar function" (*id.* at 785 n. 17). In our view, the result in this case should be the same whether the double jeopardy issues are analyzed under the rubric of Wharton's Rule or the lesser included offense doctrine. (Indeed, in our brief in *Iannelli* we urged that Wharton's Rule is simply a specific application of the lesser included offense doctrine to conspiracy cases.) Thus, although petitioner's arguments could be said to invoke Wharton's Rule, he treats this case as one arising under the lesser included offense doctrine—as did the court below—and for the sake of consistency we do the same.

[8] Section 848(b) provides that a person is engaged in a continuing criminal enterprise if—

"(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

"(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

"(B) from which such person obtains substantial income or resources."

[9] In *Iannelli* the defendants were convicted of both conspiracy and the substantive offense in one trial, but that does not diminish the relevance of that case here, for the Court's holding that the offenses were separate for purposes of punishment necessarily meant that they were separate for purposes of successive prosecutions as well. Indeed, the Court found that Congress had intended, not "to foreclose the possibility of *prosecuting* conspiracy offenses under § 371 by merging them into *prosecutions* under § 1955" (420 U.S. at 789; emphasis added), but "to retain each offense as an 'independent curb' available for use in the strategy against organized crime. *Gore* v. *United States*, 357 U.S. 386, 389 (1958)" (420 U.S. at 791).

U.S. at 785 n. 17; some citations omitted), it found the offenses to be different:

> As *Blockburger* and other decisions applying its principle reveal, see, *e.g., Gore* v. *United States,* 357 U.S. 386 (1958); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 788–789 (1946), the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. See *Gore* v. *United States, supra.* We think that the *Blockburger* test would be satisfied in this case. The essence of the crime of conspiracy is agreement, * * * an element not contained in the statutory definition of the § 1955 offense. In a similar fashion, proof of violation of § 1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of § 1955 the prosecution must prove that the defendants actually did "conduct * * * an illegal gambling business." § 1955(a). The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy.[10]

[10] Since in *Iannelli* the Court found that under the *Blockburger* test a Section 371 conspiracy is not a lesser included offense of a Section 1955 illegal gambling violation, we agree with petitioner (Br. 18) that the court below misconstrued that decision in reading it to have declared (Pet. App. 11) "a new double jeopardy approach towards complex statutory crimes." *Iannelli* did not address or decide whether (as we urge in Part III of our brief) in some cases prosecution for a greater offense is permissible following conviction and sentencing for a lesser included offense.

So in the present case an agreement is not an essential element contained in the statutory definition of a Section 848 offense. Although that Section uses the phrase "in concert with five or more other persons," while 18 U.S.C. 1955 contains the phrase "involves five or more persons," the distinction is not significant here. Neither phrase requires proof of a meeting of guilty minds. It is enough to show that the defendant acted with criminal intent, even if the other participants in the enterprise, with whom the defendant was acting "in concert," were innocent dupes unaware of the true criminal character of the enterprise."

B. The structure and legislative history of the Act make it clear (as the court of appeals correctly determined (Pet. App. 15–18)) that Congress meant Section 848 to be "an independent weapon in the government's arsenal" to combat large-scale drug violations. The Comprehensive Drug Abuse Prevention and Control Act of 1970 represented a major effort by Congress to reform the heterogeneous body of federal narcotics laws. Both chambers held extensive hearings on the subject, culminating in passage of S. 3246 by the Senate and of H.R. 18583 by the House. See S. Rep. No. 91–613, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91–1444, 91st Cong., 2d Sess. (1970).

[11] Thus, for example, a narcotics distributor who employed legitimate messenger services to deliver his narcotics could not escape conviction under Section 848 by showing that the messengers were unaware of the true contents of the packages they delivered.

Both bills reflected Congress' effort to distinguish among different drug offenses meriting different sanctions. At one end of the spectrum was occasional use of marijuana; at the other, large-scale trafficking in narcotics. For all but the most serious offenses mandatory minimum sentences were considered an impediment to rehabilitation and were accordingly eliminated. But for "*major* distribution, sale, and importation of" narcotics by professional criminals (S. Rep. No. 91-613, *supra,* at 7; emphasis added)—*i.e.,* for continuing criminal enterprises—both bills provided a mandatory minimum term of imprisonment and a maximum term of life.

H.R. 18583 was ultimately enacted into law. In its original form it (like S. 3246) treated the continuing enterprise provisions not as a separate offense but as an enhanced sentencing measure that came into effect only after conviction of some independent violation of the Act and upon the government's proof by a preponderance of the evidence, adduced at a post-trial, pre-sentencing hearing, that the defendant had been involved in large-scale, continuing narcotics activity.[12] In the House Committee on Interstate and

[12] Following hearings on several related bills, the House Subcommittee on Public Health and Welfare introduced H.R. 18583 as a clean bill and forwarded it to the House Committee on Interstate and Foreign Commerce (H.R. Rep. No. 91-1444, *supra*, at 1-2).

Since the bill appears in H.R. Rep. No. 91-1444 only in its amended form, we have lodged with the Clerk of this Court a copy of H.R. 18583 as it was originally placed before the Committee.

Foreign Commerce, however, the bill was amended (the "Dingell amendment," so-called because Congressman Dingell was its principal sponsor) to add what is now Section 848, making the continuing criminal enterprise "a new and distinct offense with all its elements triable in court" (H.R. Rep. No. 91-1444, *supra*, at 84 (Additional views)).

On the floor of the House another amendment, offered by Congressman Poff, restored to the bill a provision for enhanced sentencing. 116 Cong. Rec. 33628-33630 (1970). That provision—which is now Section 849 of Title 21—explicitly states that a showing that the defendant has participated in a conspiracy to engage in a pattern of narcotics dealing will subject him to additional punishment.[13] Congressman Eckhardt opposed the amendment, arguing that the Dingell amendment, which "created a new offense" (*id.* at 33302),[14] was to be preferred over a post-trial procedure allowing for enhanced sentencing. Congressman Poff acknowledged that Section 848 "em-

[13] Section 849(e) defines a special drug offender who is subject to enhanced punishment as one, *inter alia*, who has committed a felonious violation of the Act and——

"such felonious violation was, or the defendant committed such felonious violation in furtherance of, a *conspiracy* with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or *agreed* that he would initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing * * *." (Emphasis added.)

[14] See also *id.* at 33627 (Dingell amendment "proposed a new section" and makes a continuing criminal enterprise "an individual, separate, provable crime").

bodies a new separate criminal offense with a separate criminal penalty" (*id.* at 33631) and explained that his amendment, in contrast, "[did] not define a separate criminal offense" (*ibid.*), but was intended, rather, "to give the prosecution the option of" pursuing either conviction "of a separate crime with separate penalties" or "the imposition of larger sentences upon [defendants] convicted first of the basic crime and then shown to be dangerous offenders" (*id.* at 33630).

The foregoing indicates that Congress advisedly created in Section 848 an offense that was not meant to subsume any other, including conspiracy, elsewhere outlawed in the Act. When Congress meant to forbid a conspiracy, it did so expressly in Section 846. When it intended conspiracy to be relevant to the issue of punishment, it said so expressly in Section 849. In short, "Congress manifested its clear awareness of the distinct nature of a conspiracy" (*Iannelli* v. *United States, supra,* 420 U.S. at 788), yet in Section 848 "pointedly avoid[ed] reference to conspiracy or to agreement, the essential element of conspiracy" (*id.* at 789). It follows that "[h]ad Congress intended to foreclose the possibility of prosecuting conspiracy offenses under [Section 846], * * * it would have so indicated explicitly. It chose instead to define the substantive offense punished by [Section 848] in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy" (*ibid.*).[15]

[15] See also *United States* v. *Bommarito*, 524 F.2d 140 (C.A. 2), where the defendant argued that Wharton's Rule precluded his conviction for conspiracy under Section 846 on the ground that the sale of narcotics for which he was also convicted could not have been accomplished without the aid of his co-conspirator. The court noted (*id.* at 144, citing H.R. Rep. No. 91–1444, *supra*, at 10–11) that the purpose of the Act was to provide " 'more effective means for law enforcement aspects of drug abuse prevention and control' " and concluded (*ibid.*) that "[i]n view of Congress' obvious concern with the dangers posed by organized schemes to distribute drugs [citing Sections 848 and 849] and the careful consideration it gave to the Act's scheme of penalties, we believe that if it had intended to restrict the scope of § 846 through the application of Wharton's Rule, it would have done so explicitly." See also *Curtis* v. *United States*, C.A. 2, No. 76–3617, decided February 10, 1977.

C. Decisions of the courts of appeals support our position. In *United States* v. *Papa,* 533 F. 2d 815 (C.A. 2), certiorari denied, November 15, 1976 (No. 76–5073), the defendant argued that his prosecution in the Southern District of New York for a conspiracy in violation of Section 846 was barred on double jeopardy grounds by an earlier plea bargain he had made in the Eastern District of New York disposing of a continuing criminal enterprise charge under Section 848. In rejecting his claim the Second Circuit said (*id.* at 823):

> This Court has recognized that prosecution under section 848 is distinct and separate from a prosecution for the conspiracy and substantive offenses that may constitute some of the evidence offered on a continuing criminal enterprise count. *United States* v. *Sperling,* [506 F. 2d 1323 (C.A. 2), certiorari denied, 420 U.S. 962] (Sperling convicted of separate substantive, conspiracy, and section 848 offenses); *United States* v. *Sisca,* [503 F. 2d 1337 (C.A.

2), certiorari denied, 419 U.S. 1008] (appellant Abraham convicted of separate conspiracy and section 848 offenses); *United States* v. *Manfredi,* [488 F. 2d 588 (C.A. 2), certiorari denied, 417 U.S. 936] (appellant LaCosa convicted of separate substantive, conspiracy, and section 848 offenses).

Similarly, in the Fifth, Sixth, and Eighth Circuits defendants have been convicted of both a narcotics conspiracy and a continuing criminal enterprise. *United States* v. *Cravero,* 545 F. 2d 406 (C.A. 5); *United States* v. *Collier,* 493 F. 2d 327 (C.A. 6), certiorari denied, 419 U.S. 831; *United States* v. *Kirk,* 534 F. 2d 1262 (C.A. 8), pending on petition for a writ of certiorari, No. 75–7001. And the Fourth Circuit, while characterizing a continuing criminal enterprise as "a type of conspiracy," has expressly authorized prosecution under Section 848 following a conviction for conspiracy under Section 846. *United States* v. *Johnson,* 537 F. 2d 1170, 1175 (C.A. 4).

D. Congress in Section 848 created an unusual offense, one that does not fit comfortably into the mold of conventional double jeopardy analysis. Thus, although (as we have shown) Congress did not intend as a general matter that a prosecution for conspiracy would bar a later prosecution for a continuing criminal enterprise, we note that in a particular case a conspiracy might be a lesser included offense—albeit of an usual character—of a continuing enterprise.

One offense is necessarily included in another "if it is impossible to commit the greater without also

having committed the lesser." 2 Wright, *Federal Practice and Procedure—Criminal* § 515, p. 372 (1969). In the typical case a single act of the defendant's constitutes both the greater offense and any lesser offense necessarily included within it.[16] Although the defendant may have committed the lesser offense numerous times, usually only one lesser offense--the one that is the product of the same act that amounts also to the greater offense—is necessarily included in the greater. Thus, the defendant may have assaulted his victim on several occasions, but only the particular act of assault that results in the victim's death is necessarily included in the act condemned as murder. The earlier assaults are lesser offenses than, but cannot be considered lesser included offenses in, the actual crime of murder.[17]

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[16] That is true, for instance, of all the examples cited by Professor Wright (one act constitutes murder as well as second degree murder, manslaughter, and negligent homicide; one act constitutes robbery and larceny; one act constitutes rape and assault with intent to rape; one act constitutes assault with a deadly weapon and simple assault). 2 Wright, *supra,* at 372–373. See also *Stevenson* v. *United States,* 162 U.S. 313 (murder and manslaughter); *Sparf and Hansen* v. *United States,* 156 U.S. 51 (same).

[17] We believe that the decision of the Court of Appeals of Ohio in *Brown* v. *Ohio,* No. 75–6933, certiorari granted October 18, 1976, can be read as an illustration of this principle. There the defendant was prosecuted for automobile theft committed on November 29, 1973, after having pleaded guilty to a charge of operating the same vehicle on December 8, 1973, without the owner's consent. The court held that operating without the owner's consent was a lesser included offense of auto theft (Pet. No. 75–6993, App. 16), but it then ruled (*id.* at 17) that the defendant's

A Section 848 offense, however, in contrast to a single-act crime, is by definition a continuing offense during which a number of discrete lesser crimes will

operation of the car without the owner's consent on December 8 had been a different act from the theft and that therefore the two prosecutions did not place the defendant twice in jeopardy for the same crime. The decision can be read to say that, although operating without the owner's consent will be necessarily included in a theft when both are committed by a single act or are part of a continuous course of conduct, when the lesser offense is committed wholly independently it is not included in the greater. Such a holding would be unexceptional had the operation without the owner's consent occurred in one month and the theft in a later month, and in our view would be sound even when the crimes were committed in the reverse order (as they were in *Brown*) so long as the initial criminal episode (the theft) had come to an end before commencement of the second (the unauthorized use more than a week later).

Although the Ohio court's ruling that operating without the owner's consent is a lesser included offense of theft must be taken as an authoritative interpretation of state law, under the *Blockburger* test as it has been applied in federal cases by this Court—"focus[ing] on the statutory elements of [each] offense" (*Iannelli* v. *United States*, *supra*, 420 U.S. at 785 n. 17)—the two offenses as defined by the Ohio statutes (Pet. No. 75–6933, App. 15–16) would not be the same, since it is possible to steal an automobile without operating it (by towing it with another automobile, for example, or by loading it onto a trailer) and to operate it without the owner's consent without stealing it (the latter offense requiring proof of intent permanently to deprive the owner of possession). In short, each offense requires proof of an element that the other does not. It may be, then, that *Brown* v. *Ohio* turns on a peculiarity of Ohio law.

Finally, we note that *Brown* is in some respects similar to the federal cases involving theft and possession of the proceeds thereof. See, *e.g.*, *United States* v. *Gaddis*, 424 U.S. 544; *Heflin* v. *United States*, 358 U.S. 415. In such cases one might discern a legislative intent not to punish the thief for his subsequent possession of the loot (or, in *Brown*, his subsequent use of it), even if that

have been committed. Proof of some of those crimes is necessary to a conviction under that Section, but no one of them is a necessarily included offense, since it is possible for a defendant to engage in a continuing criminal enterprise without committing any particular lesser violation of the Act. But because it is not possible to commit a continuing criminal enterprise without also committing some underlying violations, those that the government charges are in one sense "lesser included" offenses even if they do not entirely satisfy the conventional definition of that term.

Thus, if a conspiracy were one of the underlying violations charged, then it would constitute a type of lesser included offense of the continuing criminal enterprise. In this case, however, the constituent offenses charged as part of the continuing enterprise were substantive offenses (distributing heroin and cocaine and possessing the drugs with intent to distribute them, in violation of Section 841(a)(1)).[18] It

possession is removed in time and place from the theft. See *Milanovich* v. *United States*, 365 U.S. 551. Where, as in *Brown*, such issues turn upon ascertaining the legislative purpose embodied in a State's statutory scheme, the matter may be inappropriate for determination by this Court.

[18] This case does not present the question whether a lesser included offense instruction on the constituent offenses might be appropriate, since neither petitioner nor the government requested, and accordingly the district court did not give, such an instruction on the underlying substantive violations. Petitioner did request a lesser included offense instruction on conspiracy (Tr. 1035), but that request was properly denied (Tr. 1044) because the govern-

follows that, since a conspiracy as a general matter is not necessarily included in a continuing criminal enterprise, and since in this case no conspiracy was charged against petitioner as part of the continuing criminal enterprise, his prosecution on the latter following his earlier conspiracy conviction did not amount to prosecution for a greater offense after conviction for a necessarily included offense.

III. EVEN IF CONSPIRACY IS A LESSER INCLUDED OFFENSE OF A CONTINUING CRIMINAL ENTERPRISE, SEPARATE PROSECUTION FOR EACH OFFENSE WAS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE

If the Court determines, contrary to our contentions, that Section 848 necessarily includes a conspiracy, then it must decide whether trial on the continuing criminal enterprise indictment was barred by petitioner's earlier conspiracy conviction. Petitioner contends (Br. 9–12) for a *per se* rule prohibiting prosecution for the greater offense whenever the defendant has already been convicted of a lesser included offense. We contend, to the contrary, that the Double Jeopardy Clause does not generally bar placing a defendant in jeopardy once upon a greater offense simply because he has theretofore been placed

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ment did not charge and was not required to prove a conspiracy as part of the continuing enterprise. It is true, as petitioner points out (Br. 8), that the district court included an instruction on the elements of conspiracy in its charge to the jury, but since the indictment did not allege a conspiracy and the government was not obliged to prove one, the instruction, although erroneous, could only have benefited petitioner.

in jeopardy on a lesser included offense. But regardless of the resolution of that question, even if a prosecution on the greater offense after conviction on the lesser might sometimes offend the Clause, in this case the successive prosecutions were permissible because they came about at petitioner's request (and against the government's wishes). We begin by discussing the latter point.

A. The indictment charging petitioner with conspiracy (A. 5) was returned on the same day as the indictment charging him with engaging in a continuing criminal enterprise (A. 3). The government moved (A. 12) to try the indictments together, urging (A. 13) that the offenses charged were "of the same or similar character" and that "much of the evidence" to prove the charges in the two indictments would be the same. Petitioner and his co-defendants in the conspiracy case opposed the motion, arguing that joinder was improper "for the reasons that neither the parties nor the charges are the same" (A. 15; see also A. 23 ("there is neither an identity of defendants nor an identity of charges")). The government, according to petitioner, was improperly attempting "to consolidate a conspiracy of ten (10) defendants with a substantive offense of one (1) defendant" (A. 18). The district court denied the government's motion and ordered that the indictments be tried separately.

Having thus succeeded in blocking consideration of the conspiracy and the continuing enterprise charges

in a single trial, petitioner completely reversed his position prior to trial in the present case and moved to dismiss the indictment on the ground that the government should have been required to try both charges together (A. 25, 29). He also argued (A. 30–31), as he does in this Court (Br. 7–9), that trial of the continuing criminal enterprise was barred because it was a greater offense of the conspiracy for which he had already been convicted. Reduced to its essentials, petitioner's argument is this: whenever a defendant who is charged with a crime having a lesser offense included within it can persuade the trial court to order that trial be had first on the lesser offense alone, then the Double Jeopardy Clause immunizes him from subsequent prosecution on the greater offense. We submit, on the contrary, that petitioner's successful request that the charges against him be tried in two trials rather than one placed him in the same position as a defendant who requests (or consents to) a mistrial or who successfully appeals his conviction. See generally Note, *Double Jeopardy: The Reprosecution Problem,* 77 Harv. L. Rev. 1272 (1964).

The Double Jeopardy Clause does not bar retrial of a defendant whose original trial is terminated by a mistrial granted at his own request. *United States* v. *Dinitz,* 424 U.S. 600. See also *United States* v. *Jorn,* 400 U.S. 470, 485 (plurality opinion) ("[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution * * *."); *United States* v. *Tateo,* 377 U.S. 463, 467 ("If Tateo had

requested a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him" (emphasis in original).). Indeed, numerous cases suggest that the result is the same if the defendant simply consents to rather than affirmatively requests a mistrial. *E.g., United States* v. *Jorn, supra,* 400 U.S. at 480, 484 (plurality opinion); *Downum* v. *United States,* 372 U.S. 734, 735–736; *Gori* v. *United States,* 367 U.S. 364, 368.[19]

The rationale behind the rule is clear and it applies with equal force to the present case: "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed * * *" (*United States* v. *Dinitz, supra,* 424 U.S. at 609). Here two trials came about not because of government harassment or inadvertence (cf. *Downum* v. *United States, supra*), but because petitioner insisted that this course be followed, fully aware and desirous that what he now claims violated his rights would occur.[20]

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[19] Indeed, even though the defendant had not consented to the mistrial in *Gori*, reprosecution was nevertheless allowed since the mistrial had been granted "in the sole interest of the defendant" (367 U.S. at 369).

[20] See also *United States* v. *Jamison*, 505 F. 2d 407, 413 (C.A.D.C.) ("The startling implication of barring reprosecution after a mistrial brought about by defense counsel's own errors and on his own motion is that the government could irrevocably lose the right to prosecute for a given crime without itself having committed the least impropriety, and with the trial judge having erred only in declining to second guess defense counsel as to the accused's best interests.").

The Double Jeopardy Clause also allows reprosecution following a successful appeal by the defendant of his conviction. *United States* v. *Dinitz, supra,* 424 U.S. at 609–610 n. 11; *Breed* v. *Jones,* 421 U.S. 519, 534; *United States* v. *Jorn, supra,* 400 U.S. at 484 (plurality opinion); *United States* v. *Tateo, supra,* 377 U.S. at 465–466; *Forman* v. *United States,* 361 U.S. 416; *Bryan* v. *United States,* 338 U.S. 552; *United States* v. *Ball,* 163 U.S. 662, 671–672. The rule has occasionally been explained in terms of a waiver by the defendant of his plea of former jeopardy, or of a continuation of the same jeopardy that attached at the commencement of the first trial (see *Green* v. *United States,* 355 U.S. 184, 189–194), but in more recent decisions of the Court it has been said to promote "an amalgam of interests" (*Price* v. *Georgia,* 398 U.S. 323, 329 n. 4) important to "the sound administration of justice" (*United States* v. *Tateo, supra,* 377 U.S. at 466; see also *Breed* v. *Jones, supra,* 421 U.S. at 534 ("Probably a more satisfactory explanation lies in analysis of the respective interests involved."); *United States* v. *Wilson,* 420 U.S. 332, 343–344 n. 11; *United States* v. *Jorn, supra,* 400 U.S. at 484 (plurality opinion)).

At least two such interests have been isolated, one especially important to defendants generally and the other to society at large. "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pre-

trial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution" (*United States* v. *Tateo, supra,* 377 U.S. at 466). By analogy, it is safe to say that in the present case the district court would have been less receptive to petitioner's arguments against trial on both indictments together had it known that its rejection of the government's motion for consolidation might put petitioner beyond the reach of prosecution for the continuing criminal enterprise.

The second interest served by allowing retrial after reversal of a conviction is society's interest in bringing criminals to task. See *United States* v. *Dinitz, supra,* 424 U.S. at 610–611 n. 13; *United States* v. *Jorn, supra,* 400 U.S. at 484 (plurality opinion); *United States* v. *Tateo, supra,* 377 U.S. at 466. "While overemphasis of this factor may lead to abuse and a deprivation of the rights of the accused, in circumstances where the risk of harassment is slight and that of improper acquittal is great the state's interest in securing convictions should be given considerable weight." Note, *supra,* 77 Harv. L. Rev. at 1274. In the present case the risk of harassment was nonexistent, and, although before his trial on the continuing enterprise no jury had yet found petitioner guilty of that offense, the charge laid was serious—the most serious that Congress has defined in its effort to curb drug-dealing in this country. "Fairness to society" (*Price* v. *Georgia, supra,* 398 U.S. at 329 n. 4) supports our position that petitioner's trial for engaging

in a continuing narcotics enterprise was not barred by his fulfilled desire to have the conspiracy charge tried separately.

Petitioner objects to the result we seek on the ground (Br. 23–24) that his successful resistance to a single trial of both indictments was not a waiver of his double jeopardy rights under the knowing, intelligent, and voluntary standard enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458. The respondent in *United States* v. *Dinitz, supra*, made the same argument with respect to his successful request for a mistrial. It was rejected there for reasons equally pertinent here, where "traditional waiver concepts have little relevance" (424 U.S. at 609).[21] "[T]he policy of the Double Jeopardy Clause, weighed as it always must be against the interest of the state in pursuing criminal prosecutions to their conclusions, is simply not thought to require that a defendant be free of further prosecutions when it was he, and not the judge or prosecutor, who sought to have the original prosecution [post-

[21] In *Dinitz* the Court catalogued (424 U.S. at 609–610 n. 11) the cases in which it had "implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right. See *Breed* v. *Jones*, 421 U.S. 519, 534; *United States* v. *Wilson*, 420 U.S. 332, 343–344, n. 11; *United States* v. *Jorn*, 400 U.S. 470, 484–485, n. 11 (plurality opinion); *United States* v. *Tateo*, 377 U.S. at 466."

Even if the *Johnson* v. *Zerbst* standard were otherwise applicable in double jeopardy cases, petitioner's deliberate, tactical decision to oppose a single trial on both indictments would preclude him from invoking it. See *Henry* v. *Mississippi*, 379 U.S. 443, 450–453.

poned]" (*United States* v. *Jamison, supra*, 505 F. 2d at 412). See also *Ludwig* v. *Massachusetts*, No. 75–377, decided June 30, 1976, slip op. 13; *United States ex rel. Jackson* v. *Follette*, 462 F. 2d 1041, 1052–1053 (C.A. 2) (Mansfield, J., concurring), certiorari denied, 409 U.S. 1045.[22]

B. The successive prosecutions in this case can be justified under a broader rationale than that just advanced. We submit that prosecution for the greater offense is always permissible after conviction on the lesser, so long as the defendant is not placed twice in jeopardy for either offense. At the very least, prosecution of the greater offense should be allowed whenever the government was unable to or could not reasonably have been expected to try that offense at the time of the trial of the lesser included offense.

[22] Petitioner also argues (Br. 22–23) that *Simmons* v. *United States*, 390 U.S. 377, protects him from having to choose between defending against both charges in a single trial (which he claims would violate due process) and defending against them in two trials (which he claims would violate the Double Jeopardy Clause). In *Simmons* the Court held that a defendant's testimony (at a suppression hearing) that is necessary to vindication of his Fourth Amendment rights cannot be used against him at trial, in derogation of his Fifth Amendment privilege against compelled self-incrimination, lest to assert one constitutional right he be made to forego another. *Simmons* does not support petitioner's effort to avoid prosecution for the continuing criminal enterprise, for if that offense and conspiracy are—as petitioner asserts—simply greater and lesser degrees of the same crime, then petitioner had no constitutional right not to have them tried together in the first place. And if—as we contend—they are different crimes, then petitioner had no right under the Double Jeopardy Clause not to be prosecuted for them in separate trials.

In its relation to the Double Jeopardy Clause, the lesser included offense doctrine is a type of test for identity of offenses. As such, it implements two essential purposes of the Double Jeopardy Clause itself, *viz.*, to guarantee that a convicted defendant will not suffer for his crime any more punishment than the legislature thought appropriate, and to accord finality to verdicts in criminal cases. *United States* v. *Dinitz, supra,* 424 U.S. at 606; *United States* v. *Jorn, supra,* 400 U.S. at 479 (plurality opinion); see *North Carolina* v. *Pearce,* 395 U.S. 711, 717; *Green* v. *United States, supra,* 355 U.S. at 187–188; Note, *supra,* 75 Yale L.J. at 277–278; Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 Yale L.J. 339, 340–341 (1956); Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution,* 28 U. Chi. L. Rev. 591, 593–594 (1961).

Thus, when two offenses stand in relation to each other as a greater and a lesser included, they may in some respects be considered the same offense for double jeopardy purposes, with the result (1) that cumulative punishment is forbidden on the assumption that, in fixing the penalty for the greater, the legislature necessarily took into account the punishment deserving on the lesser offense as well, and (2) that prosecution for one of the offenses following trial on the other is in certain cases forbidden.

Whenever the greater offense is prosecuted first, a subsequent prosecution on the lesser included offense

is properly barred because the defendant will have been in jeopardy on that offense during trial of the greater. Conviction and punishment on the greater is tantamount to a conviction and punishment on the lesser offense as well, and the risk of these consequences constitutes jeopardy and bars the second trial even if the first trial results in an acquittal.[23] See *Breed* v. *Jones, supra,* 421 U.S. at 528 ("Jeopardy denotes risk."); *Price* v. *Georgia,* 398 U.S. 323, 326, 329; *In re Nielson,* 131 U.S. 176, 187–190; *Grafton* v. *United States,* 206 U.S. 333, 349–352. Cf. *United States ex rel. Jackson* v. *Follette, supra,* 462 F. 2d at 1044–1045.

Similarly, when the lesser offense is tried first and results in acquittal, prosecution on the greater is properly barred in every case because the defendant

[23] In most prosecutions for a greater offense either party will be entitled upon request to a lesser included offense instruction (see *Keeble* v. *United States,* 412 U.S. 205; *Sansone* v. *United States,* 380 U.S. 343; *Berra* v. *United States,* 351 U.S. 131) and when such an instruction is given the defendant will clearly have been tried simultaneously on both offenses. But even in those cases where the evidence precludes a lesser included offense instruction and allows the jury only the choice between conviction on the greater offense or acquittal (see, *e.g., Sparf and Hansen* v. *United States, supra*), the possibility of conviction and punishment on the greater is tantamount to jeopardy on the lesser. *Fuller* v. *United States,* 407 F. 2d 1199, 1227–1229 (C.A.D.C.) (*en banc*), certiorari denied, 393 U.S. 1120. Indeed, even where no lesser included offense instruction is given and the defendant's conviction on the greater offense is overturned on appeal, the appellate court may in an appropriate case order that judgment of conviction be entered on the lesser included offense. See *Tinder* v. *United States,* 345 U.S. 565; cf. *United States* v. *Swiderski,* C.A. 2, No. 76–1415, decided February 1, 1977; *Austin* v. *United States,* 382 F. 2d 129, 137–143 (C.A.D.C.).

cannot have committed an offense having as an essential element another offense of which he has been absolved. The acquittal on the lesser is tantamount to an acquittal on the greater, and the Double Jeopardy Clause forbids the government from a further attempt at conviction. *Grafton* v. *United States, supra.*

But when the lesser included offense is tried first and results in conviction, it does not follow that subsequent prosecution for the greater offense will necessarily run afoul of the Double Jeopardy Clause. This Court held as much in *Diaz* v. *United States,* 223 U.S. 442, where, following the defendant's conviction for assault and battery, the victim died and a charge of homicide was brought. The Court approved the second prosecution, pointing out (*id.* at 449) that the defendant had not been in jeopardy for the homicide at the trial for assault and battery, and that "[a]ll that could be claimed for [the jeopardy at that trial] was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done * * *."[24]

[24] Although *Diaz* was decided under a double jeopardy statute enacted by Congress to apply in the Philippine Islands, rather than under the Double Jeopardy Clause of the Fifth Amendment, the language of the former ("No person, for the same offense, shall be twice put in jeopardy of punishment"; see *Gavieres* v. *United States*, 220 U.S. 338, 341) was quite similar to that of the latter ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"; U.S. Const., Fifth Amendment), and decisions under the statute have frequently been treated by this Court as authority in cases arising under the constitutional provision. *E.g., Blockburger* v. *United States, supra*, 284 U.S. at 304 (citing *Gavieres, supra*); *Price* v. *Georgia, supra*, 398 U.S. at 327–329 (citing an authoritative *Kepner* v. *United States*, 195 U.S. 100, decided under the statute); but see *Green* v. *United States*, 355 U.S. 184, accepting *Kepner* but distinguishing *Trono* v. *United States*, 199 U.S. 521, for having been decided under the statute.

In the present case petitioner was not in jeopardy of conviction for the continuing criminal enterprise during his conspiracy trial. Nor was he in jeopardy on the conspiracy charge during his trial for the continuing criminal enterprise, since conspiracy was not treated as a lesser included offense of that crime. In short, he has not been "twice put in jeopardy" (U.S. Const., Fifth Amendment) for either offense, and the subsequent prosecution for the continuing enterprise was therefore proper under *Diaz.*[25]

[25] Our position does not leave a defendant at the mercy of a prosecutor bent on carving up a crime into one or more lesser included offenses and bringing them in a series of piecemeal prosecutions in ascending order of seriousness, for even if the successive prosecutions never place the defendant twice in jeopardy for the same offense the procedure might nevertheless be so unfair as to violate due process. Cf. *Blackledge* v. *Perry*, 417 U.S. 21, and *North Carolina* v. *Pearce*, 395 U.S. 711, where this Court held that a defendant who successfully appeals his conviction is protected upon retrial against prosecutorial or judicial vindictiveness by the Due Process Clause rather than the Double Jeopardy Clause. In this case, however, where the government sought to try both offenses together but was prevented from doing so by order of the district court, the successive prosecutions did not violate due process. "[I]t cannot be oppressive for the prosecution to do what the court has told it that it must do." *Connelly* v. *D.P.P.*, [1964] 2 All E.R. 401, 437–438.

Diaz has been read as standing for the proposition that "jeopardy will not attach to the first trial of an offense arising out of the same criminal episode where, at the time of the first prosecution, the offense was not completed." *Culberson* v. *Wainwright,* 453 F. 2d 1219, 1220 (C.A. 5); see also *Blackledge* v. *Perry,* 417 U.S. 21, 29 n. 7; Lugar, *Criminal Law, Double Jeopardy and Res Judicata,* 39 Iowa L. Rev. 317, 322 (1954); Note, *Criminal Law—Double Jeopardy,* 24 Minn. L. Rev. 522, 545 (1940). In our view it stands for the broader proposition just advanced—that prosecution for the greater offense following conviction of a lesser included offense is permissible so long as a second jeopardy is avoided. At the very least, however, we submit that *Diaz* supports a rule allowing prosecution of the greater offense whenever for legitimate reasons the government could not have charged it at the trial of the lesser offense.

Thus, in *Blackledge* v. *Perry, supra,* where the Court held that due process was violated when the State brought a more serious charge against a defendant who had exercised his statutory right to trial *de novo* of a minor charge of which he had been convicted, the Court noted (417 U.S. at 29 n. 7) that "[t]his would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States* * * *." And Mr. Justice Brennan, concurring in *Ashe* v. *Swenson,* 397 U.S. 436, 453 n. 7, cited *Diaz* in support of the statement

that "where a crime is not completed or not discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception to the 'same transaction' rule should be made to permit a separate prosecution." See also *United States* v. *Jamison, supra,* 505 F. 2d at 416–417.

Professor Friedland states this position succinctly in describing the English rule (Friedland, *Double Jeopardy* 192 (1969)):

> [T]he rule against splitting a case should not apply * * * when the prosecutor could not have initially charged the accused with the offence subsequently charged. This would encompass situations where it was not legally possible to do so, as in the intervening death cases, as well as those in which the prosecutor could not, at the time of the first trial, have known by the exercise of reasonable diligence of the commission of the offenses subsequently charged or, perhaps, because extended investigation would be necessary before the Crown would be ready to proceed with the further charges.[1]

[1] See *Williams and Wilson* [1965] N.I. 52 at p. 61, in which the "Crown proceeded with the first trial at a time when its investigations into the offenses which became the subject of the second prosecution were not complete—probably because they involved dealings or alleged dealings on the Continent" and thus did not know of the further offences; the Court held that in these circumstances a second prosecution was not improper. * * *

See also *id.* at 101–103, 185, 188–191; cf. Note, *supra,* 75 Yale L.J. at 295 (where the defendant successfully objects to compulsory joinder "severance should be granted, and the prosecutor should be allowed to re-prosecute on the severed count").[26]

A fortiori, the "rule against splitting a case" does not apply where, as here, the prosecution sought to try both offenses together but the defendant convinced the trial court to prohibit that course.

The rule for which we contend fully respects the values protected by the Double Jeopardy Clause. When the greater offense was not known, or for any other legitimate reason could not have been tried simultaneously with the lesser included offense for which the defendant has already been convicted, it cannot be said that in bringing the greater to trial the government threatens the validity of a prior acquittal (see Note, *supra,* 75 Yale L.J. at 278) or engages in "repeated attempts to convict an individual for an alleged offense * * * enhancing the possibility that even though innocent he may be found guilty" (*Green* v. *United States, supra,* 355 U.S. at 187–188). A conviction on the greater offense will not be one "for whose justice no man could vouch," and the trial

[26] In *Connelly* v. *D.P.P.*, [1964] 2 All E.R. 401, where a rule of practice prevented the defendant from being charged in one case with both murder and aggravated robbery occurring during the same criminal episode, the court (House of Lords) allowed successive prosecutions notwithstanding the rule against splitting a case. See *id.* at 406 ("[W]here it would have been improper to combine the charges * * * or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable.") (Lord Reid); see also *id.* at 412 (Lord Morris); *id.* at 446 (Lord Devlin).

itself does not smack of "the callousness of repeated prosecutions" that the Double Jeopardy Clause was intended to prohibit (*id.* at 219, Frankfurter, J., dissenting). If the defendant has successfully concealed the full extent of his crime (or, as here, successfully resisted simultaneous prosecutions), he should not be heard to object that he "live[s] in a continuing state of anxiety and insecurity," or that he suffers "embarrassment, expense and ordeal" (*id.* at 187) by the trial itself. Finally, the defendant will not have been in jeopardy of conviction of and punishment for the greater offense at trial of the lesser, nor will he be in jeopardy of conviction of or punishment for the lesser at trial of the greater. See *Diaz* v. *United States, supra,* 223 U.S. at 449.[27] In sum, the prosecution for the greater offense in the circumstances outlined here vindicates society's interest in the enforcement of its criminal laws, yet subjects the defendant to none of the oppressive practices that the Double Jeopardy Clause forbids.

C. *Waller* v. *Florida,* 397 U.S. 387, does not declare a *per se* prohibition against prosecution for a greater offense in all cases where the defendant has been convicted of a lesser included offense. There the issue

[27] As we have indicated (p. 17, *supra*), double punishment is avoidable by crediting any penalty imposed upon the lesser offense in fixing the penalty for the greater. See Note, *supra,* 75 Yale L.J. at 289 n. 128, 291 n. 132. If after conviction of the greater offense the defendant can show adverse collateral effects resulting from the continued appearance on his record of the conviction for the lesser included offense, then presumably he would be entitled to have that conviction vacated. *Fuller* v. *United States, supra,* 407 F. 2d at 1233 n. 52.

was "the asserted power of * * * two courts within one State to place petitioner on trial for the same alleged crime" (*id.* at 390). Although the decision proceeded on the premise that a lesser and a greater offense are the same for double jeopardy purposes, the Court's inquiry focused on the applicability of the federal-state "dual sovereignty" decisions (*Bartkus* v. *Illinois,* 359 U.S. 121; *Abbate* v. *United States,* 359 U.S. 187) to separate state and municipal prosecutions, and therefore the Court cannot be said to have passed on the issue presented here. See *Culberson* v. *Wainwright, supra,* 453 F. 2d at 1220. Indeed, in both *Waller* itself (see 397 U.S. at 395) and *Robinson* v. *Neil,* 409 U.S. 505, 506 (ruling that *Waller* is retroactive), the Court described the holding in that case in terms of dual sovereignty alone.[28]

Moreover, the acts that were the subject of the successive prosecutions in *Waller* (destruction of city property and disorderly breach of the peace in municipal court, and grand larceny in the state court) occurred at the same time and might have been prosecuted in one trial.[29] The question whether the greater offense may in some circumstances be prosecuted after

[28] That the question of the permissibility of prosecuting the greater offense after conviction on the lesser remained open after *Waller* seems plain from the manner in which the Court declined to reach it in *Blackledge* v. *Perry, supra,* 417 U.S. at 25, as well as from the grant of certiorari in *Brown* v. *Ohio, supra.*

[29] *Waller* did not indicate whether either of the courts involved would have had jurisdiction over the offenses charged in the other, or whether separate prosecutions might have been allowed if complete jurisdiction did not lie in either court. Cf. *Ashe* v. *Swenson, supra,* 397 U.S. at 455 n. 11 (Brennan, J., concurring).

conviction of the defendant of a lesser offense at a time when the greater could not have been charged and tried simply was not presented and cannot be said to have been adjudicated. See *Stone* v. *Powell,* No. 74–1055, decided July 6, 1976, slip op. 12–14 and nn. 14, 15.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General.
ROBERT J. ERICKSON,
Attorney.

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